

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

KEVIN EUGENE RILEY,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

DOCKET NUMBER WD73735

Date: January 31, 2012

Appeal from:
Saline County Circuit Court
The Honorable Robert M. Liston, Judge

Appellate Judges:
Division One: Alok Ahuja, P.J., Thomas H. Newton and James E. Welsh, JJ.

Attorneys:
Shaun J. Mackelprang and Dora A. Fichter, Jefferson City, MO, for appellant.
Gary E. Brotherton, Columbia, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

KEVIN EUGENE RILEY

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WD73735

Saline County

Appellant Kevin Riley was convicted following a jury trial of third-degree domestic assault and multiple drug offenses. Riley appealed. Although we affirmed the substance of Riley's convictions, we concluded that the trial court's judgment had improperly classified Riley's convictions for manufacture of a controlled substance and possession of a controlled substance as class A felonies, based on the court's finding that Riley was a prior and persistent drug offender. While we concluded that the trial court had properly found Riley to be a prior and persistent drug offender, and that Riley's recidivist status authorized the trial court to *sentence him* as if he had committed class A felonies, we held that Riley's status as a prior and persistent drug offender did not result in the *reclassification* of his convictions for manufacture and possession of a controlled substance as class A felonies. We remanded with instructions that the circuit court enter an amended judgment reclassifying Riley's drug possession and manufacturing convictions.

On remand, Riley asked his attorney to make arguments concerning his underlying sentences at a hearing called by the circuit court. Counsel refused. Consistent with our mandate, the circuit court entered an amended judgment revising the classification of the drug possession and manufacturing convictions, but reimposing the same terms of imprisonment as before.

Riley filed a motion for postconviction relief. He asked his appointed counsel about asserting an ineffective assistance of counsel claim based on counsel's failure to reargue Riley's sentencing when the case was remanded. Postconviction counsel advised Riley that his sentence had been fixed by his direct appeal, because the circuit court was directed on remand only to reclassify the convictions, and had no authority to resentence Riley. Postconviction counsel did not obtain or review the transcript of the remand hearing in connection with her representation of Riley on his Rule 29.15 motion. Appointed counsel did, however, file an amended motion on Riley's behalf, which was denied by the circuit court, with that denial affirmed on appeal.

Riley thereafter filed a motion to reopen his postconviction proceeding, arguing that he had been abandoned by appointed postconviction counsel when she refused to obtain or review a transcript of the remand hearing. The circuit court denied Riley's motion to reopen. Riley now appeals.

AFFIRMED.

Division One Holds:

Under Rule 29.15(e), postconviction counsel must "ascertain whether sufficient facts supporting the claims are asserted in the [*pro se*] motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence." Where counsel fails to discharge this duty, this may constitute abandonment which justifies the reopening of the postconviction proceeding.

The circuit court did not clearly err in finding that Riley was not abandoned by post-conviction counsel. Rule 29.15(e) does not require postconviction counsel to review every page of the record before determining whether there are any additional facts or claims to be asserted in an amended motion. Instead, postconviction counsel is entitled to exercise his or her reasonable professional judgment to determine what level of inquiry is necessary to ensure that all viable postconviction claims, and all facts supporting those claims, are properly presented.

Here, given the limited nature of our remand postconviction counsel could reasonably determine that counsel could not have successfully argued for resentencing at the remand hearing. Review of the transcript of that hearing was unnecessary to this determination. Postconviction counsel was under no duty to conduct further investigations of an ineffective assistance of counsel claim which would have been unsuccessful.

Before: Alok Ahuja, P.J., Thomas H. Newton and James E. Welsh, JJ.

Opinion by: Alok Ahuja, Judge

January 31, 2012

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